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Associazione Svizzera per l'Arbitrato  
Swiss Arbitration Association

# ASA

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# Negative effect of competence-competence revisited

Note on 4A\_560/2013, Judgment of 30 June 2014\*

BERNHARD BERGER\*\*

The Claimant seised the District Court (*Bezirksgericht*) of Meilen in the Canton of Zurich with a claim against several Respondents arising out of a Consortium Agreement. The Consortium Agreement contained a concise jurisdiction clause referring to “Meilen” and, in a separate paragraph, a provision that, on the face of it, looked like an (optional) arbitration clause.<sup>1</sup> Relying on the latter, the Respondents raised an arbitration defense, and requested that the dispute be referred to arbitration. The District Court accepted the *exceptio arbitri* and declared the claim inadmissible, finding that the Consortium Agreement contained a valid arbitration clause. The Court of Appeals (*Obergericht*) of the Canton of Zurich dismissed the Claimant’s appeal and confirmed the judgment of the District Court. The Swiss Federal Supreme Court (*Bundesgericht*), however, annulled the judgment of the Court of Appeals, deciding that the Consortium Agreement contained no valid arbitration clause.

At the time of the conclusion of the purported arbitration clause, the Claimant and the Respondents all had their domiciles in Switzerland. It seems that no place or seat of the arbitration was mentioned in the disputed clause or elsewhere in the Consortium Agreement. Nevertheless, the Supreme Court proceeded on the basis of the assumption that the arbitration, if any, would be governed by the provisions on *domestic arbitration* contained in Part 3 of the Swiss Code of Civil Procedure (CCP).<sup>2</sup>

Thus, the background of the case in fact offered the Supreme Court the first opportunity to apply Article 61(b) CCP, which reads as follows:<sup>3</sup>

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\* ASA Bull. 3/2014, p. 530. The Judgment will be published as BGE/ATF in the Swiss Federal Supreme Court’s Official Collection of Decisions.

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<sup>1</sup> For the details of the clauses, see 4A\_560/2013 (see above), para. A.b. As to optional arbitration agreements, see e.g. Bernhard Berger, *Konkurrierende, optionale und asymmetrische Schieds- und Gerichtsstandsklauseln*, in: Jusletter of 13 May 2013 ([www.weblaw.ch](http://www.weblaw.ch)).

<sup>2</sup> See 4A\_560/2013, para. 2.1.

<sup>3</sup> The English text corresponds to the translation of the CCP which the Swiss Federal Government provides for information purposes on [www.admin.ch](http://www.admin.ch).

*“If the parties have concluded an arbitration agreement relating to an arbitrable dispute, the seised court shall decline jurisdiction unless: ... [b.] the court holds that the arbitration agreement is manifestly invalid or unenforceable”.*

It should be noted that, in the context of *international arbitration*, the Supreme Court has developed well-settled and repeatedly confirmed case law, according to which a Swiss court shall deal with an arbitration defense as follows:

- If the purported arbitration agreement designates a place of arbitration *outside Switzerland*, i.e. where the arbitration defense is governed by Article II(3) of the New York Convention (NYC), the Swiss court shall examine the validity of that arbitration agreement with *unfettered powers of review*.<sup>4</sup>
- If, however, the purported arbitration agreement designates a place of arbitration *in Switzerland*, i.e. where the arbitration defense is governed by Article 7(b) of the Swiss Private International Law Statute (PILS), the Swiss court shall only perform a *summary examination* of the disputed arbitration agreement.<sup>5</sup>

With its case law on Article 7(b) PILS, the Supreme Court thus partially recognised the concept that the principle of competence-competence of an arbitral tribunal has a *negative effect*: A Swiss court shall give preference to the arbitral tribunal in the sense that the latter shall be the first authority to examine the validity of the purported arbitration agreement with unfettered powers of review, unless a summary examination shows that no arbitration agreement exists between the parties.

Article 7(b) PILS reads as follows:

*“If the parties have concluded an arbitration agreement relating to an arbitrable dispute, the seised court shall decline jurisdiction unless: ... [b.] the court holds that the arbitration agreement is null and void, invalid or unenforceable”.*

It is apparent that the texts of Article 7(b) PILS and Article 61(b) CCP are almost identical, except for one aspect: The latter states that the invalidity or unenforceability of the disputed arbitration agreement must be “*manifest*”. As the Supreme Court rightly noted, the Swiss legislature thereby intended to codify for Swiss domestic arbitration the concept of a mere summary

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<sup>4</sup> BGE 121 III 38 para. 2b.

<sup>5</sup> BGE 122 III 139 para. 2b. Most recently confirmed in BGE 138 III 681 para. 3, with numerous references to supporting and criticising commentators.

examination of a purported arbitration agreement as applicable under Article 7(b) PILS, pursuant to the relevant case law referred to above.<sup>6</sup>

On this basis, one would have expected that the Supreme Court, in the case at hand, would take the occasion to find that its long-standing case law under Article 7(b) PILS shall apply *mutatis mutandis* under Article 61(b) CCP. However, and against this expectation, the Supreme Court used the opportunity to interpret and apply the new Article 61(b) CCP in a significantly different way.

Indeed, the Supreme Court decided that, under Article 61(b) CCP, a Swiss court confronted with an arbitration defence shall examine with *unfettered powers of review* whether there is (i) an arbitration agreement and (ii) a dispute that is capable of settlement by arbitration.<sup>7</sup> Only where these two prerequisites are satisfied, the Swiss court shall then assess, on the basis of a *summary examination*, whether there is “*manifestly*” no valid or enforceable arbitration agreement between the parties.<sup>8</sup>

The fundamental effect of the Supreme Court’s interpretation of Article 61(b) CCP is that, under this provision, there is no summary examination with regard to all issues pertaining to the existence of the purported arbitration agreement. This includes all matters concerning the formation and (valid) conclusion of the arbitration agreement at issue, notably the question whether the parties have reached consent to arbitrate. In short, it follows from this new case law that under Article 61(b) CCP the summary examination requirement is *de facto* limited to disputes about the scope of a (valid and enforceable) arbitration agreement or any pathological parts thereof.<sup>9</sup>

In our view, the Supreme Court’s interpretation of Article 61(b) of the CCP is a step into the right direction. It indicates that the Supreme Court is prepared to deviate from, and at least in part abandon, the much debated case law it had developed under Article 7(b) PILS. We suggest that it would indeed be consistent if the Supreme Court, at the next opportunity, would consider extending its interpretation of Article 61(b) CCP to arbitration defenses that are subject to Article 7(b) PILS.<sup>10</sup> In our view, this would be

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<sup>6</sup> See 4A\_560/2013 para. 2.2.3. See also BGE 138 III 681 para. 3.2 with references.

<sup>7</sup> 4A\_560/2013 para. 2.2.3.

<sup>8</sup> 4A\_560/2013 para. 2.2.3.

<sup>9</sup> See 4A\_560/2013 para. 2.2.3 in fine.

<sup>10</sup> It is interesting to note that the Supreme Court, in 4A\_560/2013, carefully avoided making any specific references to Article 7(b) PILS and its corresponding case law, let alone made any declarations to the effect that its interpretation of Article 61(b) PILS would somehow

justified because Article 7(b) PILS – contrary to Article 61(b) CCP – does not mention that a Swiss court shall only accept jurisdiction if the disputed arbitration agreement is “*manifestly*” invalid or unenforceable. The plain text of Article 7(b) PILS thus indeed never gave rise to an assumption that the Swiss legislature had intended this provision to implement a negative effect of competence-competence.<sup>11</sup>

In the case at hand, the restricted scope of the summary examination requirement had the effect that the Supreme Court examined with unfettered powers of review whether, on the basis of the wording of the rather pathological clause at issue, the parties to the Consortium Agreement had validly consented to arbitrate.<sup>12</sup> Contrary to the findings of the Court of Appeals (and the District Court), the Supreme Court concluded that they had not.<sup>13</sup> It found that the disputed clause was not an arbitration agreement, but could at best be construed as an “agreement to attempt to agree” on arbitration once a difference under the Consortium Agreement has arisen.<sup>14</sup>

What other lesson(s) can be learned from the present case? – If any, it is the platitude that dispute resolution clauses should be drafted carefully. It is not recommended to combine jurisdiction and arbitration provisions in one and the same contractual document (as did the parties to the Consortium Agreement). Nor should an arbitration provision – as in the present case<sup>15</sup> – be drafted in a manner that gives rise to serious doubts on whether there is a (valid) consensus to arbitrate.

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mark a change of case law. However, this cannot hide the fact that the interpretation of Article 61(b) CCP now substantially differs from the one of Article 7(b) PILS.

<sup>11</sup> See, e.g. Jean-François Poudret and Sébastien Besson, *Comparative Law of International Arbitration*, 2<sup>nd</sup> edition 2007, paras 502-504. See also Bernhard Berger, *Kritische Gedanken zur Revision von Art. 7 IPRG im Lichte eines praktischen Beispiels*, ASA Bull. 2011 pp. 33 ss, pp. 36-37.

<sup>12</sup> 4A\_560/2013 para. 3, in particular para. 3.3.3.

<sup>13</sup> 4A\_560/2013 para. 3.3.2.

<sup>14</sup> For details, see 4A\_560/2013 para. 3.3.2.

<sup>15</sup> For the details of the arbitration clause at issue, see 4A\_560/2013, para. A.b.



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